

No. 21-113

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In the  
**Supreme Court of the United States**

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UJ-EIGHTY CORPORATION,  
PETITIONER

v.

CITY OF BLOOMINGTON BOARD OF ZONING APPEALS,  
RESPONDENT

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE INDIANA SUPREME COURT*

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**BRIEF OF FRATERNITY FORWARD COALI-  
TION AND FRATERNAL HOUSING ASSOCIA-  
TION AS AMICI CURIAE  
SUPPORTING PETITIONER**

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### INTEREST OF *AMICI CURIAE*<sup>1</sup>

The Fraternity Forward Coalition (“FFC”) is an unincorporated association, based in Indiana, that promotes the shared positive values of fraternal life, encourages safe and healthy behaviors among its undergraduate members, and advocates for student and fraternal organization rights. FFC is comprised of five international fraternal organizations: Alpha Epsilon Pi, Alpha Sigma Phi, Alpha Tau Omega, Kappa Alpha Order, and Theta Chi. The individual member organizations of FFC represent more than 43,000 undergraduate members in 775 chapters with nearly 600,000 living alumni members.

The founding principle goals of FFC include:

- Guaranteeing that students’ fundamental constitutional right of free assembly is not violated or threatened.
- Working to strengthen understanding of host university conduct policies and ensuring that said policies provide due process, fundamental fairness, equality, and proportional discipline.
- Educating college administrators about the importance of fraternity membership in terms

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<sup>1</sup> As required by Supreme Court rules 37.3 and 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this appeal have consented in writing to the filing of this brief.

of student engagement, happiness, retention, and academic success.

Where and when possible, FFC members seek to collaborate with host institutions through official recognition status. But it is sometimes necessary for a chapter to exist without official university recognition. FFC supports higher education by promoting self-determination through fraternal structure and operations and firmly believes that is possible, and often necessary, without official recognition.

The Fraternal Housing Association ("FHA") is a 501(c)(6) nonprofit corporation located in Indiana. FHA membership is open to all individuals, fraternal organizations, and vendors that work with fraternal housing. Its mission is to promote and advocate for fraternity housing through organized collaborative efforts of its members. FHA represents the interests of the largest source of affordable student housing in the nation with over \$3 billion in assets deployed as nonprofit and education focused housing and food service facilities. These facilities house over 250,000 students, serve millions of meals, and provide educational space and programming to over 500,000 students each year.

FHA members and member organizations work diligently to foster safe and supportive educational housing. They work closely with governmental entities to maintain legal compliance and often work with non-governmental community stakeholders such as neighborhood associations, local clubs, and universities. However, individual students and organizations that reside in FHA fraternal-oriented facilities may choose to associate or organize with or without university recognition.

If not reversed, the decision of the Indiana Supreme Court will endanger the economic viability of fraternity and sorority houses across the nation, will harm property owners, will threaten students' associational interests, and

will serve as a blueprint for municipalities and universities to use zoning regulations as a means to destroy fraternity chapters, organizations and privately held nonprofit housing options for students.

## INTRODUCTION AND SUMMARY OF ARGUMENT

On December 5, 1776, a group of students at William and Mary College formed the first collegiate fraternity in the United States. William R. Baird, Jack L. Anson, & Robert F. Marchesani, Baird's Manual of American College Fraternities § I-10, (20<sup>th</sup> ed. 1991). Fraternities and sororities,<sup>2</sup> including the members of FFC, have played a vital role on college campuses since that time, helping to develop well-rounded, intellectually-curious, and community-minded students.

Despite this long history of positive contributions to student life and college campuses, some cities and campuses seek to end fraternities as they have existed for centuries. The use of zoning codes is but the most recent means to eliminate chapters by devaluing chapter houses.

This case asks whether a municipality can delegate zoning authority to a local university that is also a neighboring landowner and economic competitor for student housing. On this critical question of due process rights, *Amici* agrees with and endorses the legal arguments set forth in U-J Eighty Corporation's Petition for a Writ of Certiorari. It is a well-established and entrenched principle that the Due Process Clause prohibits the sort of delegation of authority that Bloomington granted to Indiana University. An increasing number of

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<sup>2</sup> The arguments in this brief apply to both fraternities and sororities. For brevity and because the members of FFC are all male-member fraternities, this brief will refer to fraternities.

other municipalities across the country are likewise delegating zoning authority to schools to define "fraternity house" for zoning purposes. The Court should end this national trend and reaffirm that such delegation violates the Due Process Clause.

These restrictive zoning codes also directly interfere with and limit the ability of students to freely associate. Zoning regulations cannot be used as a means to limit students' ability to associate together or to advance an agenda to eliminate fraternal organizations.

Forcing the closure of chapter houses through restrictive and arbitrary zoning regulations will cause immediate and irreparable harm to fraternity chapters and undergraduate students across the nation.

The need for quality housing is a must for a fraternity's growth, development, and success. Housing is a vital part of the fraternal experience. Fraternity chapter houses are often large, unique structures that cannot be easily adapted to other uses. Chapter house sizes vary greatly from chapter to chapter and campus to campus, but can often house anywhere from 50 to well over 100 students.

As a result, zoning codes that require university recognition for a fraternity use jeopardizes thousands of properties across the country that house hundreds of thousands of students worth billions of dollars.

If a university, as a competitor for student housing, is allowed to control the zoning for fraternity housing, it will destabilize and ultimately destroy fraternity housing.



## ARGUMENT

### I. BLOOMINGTON'S ORDINANCE IMPROPERLY DELEGATED GOVERNMENTAL AUTHORITY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

With no procedure for City review or approval, Bloomington Unified Development Ordinance § 20.11.020 delegated the ability to determine whether a property owner complied with the city's zoning requirements to Indiana University ("IU"). In order to qualify as a "Fraternity/Sorority House," IU had to bless the fraternity with official university recognition status. Bloomington retained no discretion or authority on the question of whether a group could qualify as a "Fraternity/Sorority" use if the group lacked recognition from IU. This is a clear delegation of Bloomington's zoning authority to IU.

Bloomington's zoning delegation is substantially similar to the one in *425 Prop. Ass'n of Alpha Chi Rho, Inc. v. State Coll. Borough Zoning Hearing Bd.*, 223 A.3d 300 (Pa. Commw. Ct. 2019). In that case, State College Borough delegated zoning authority to Penn State University. Specifically, only "members of a University recognized fraternity or sorority" qualified as a "Fraternity House" under the Borough's zoning code. The Pennsylvania Court of Appeals noted, "that the Borough has unconstitutionally delegated its authority to determine the existence of a 'Fraternity House' under the Zoning Code." *Id.* at 313, n.9.

The principle that a municipality cannot delegate zoning authority, especially to a neighboring property owner and economic competitor, is well-established for a reason:

To give a neighboring real estate owner an uncontrollable right to object may...be given him the whip hand over the applicant for a license; and it will depend entirely upon the character of him who holds that whip, whether this instrument of castigation be used for the owner's protection or be applied in securing unjust booty.... But when you give the absolute right to object, you have put into the hands of men an irresistible weapon. Argument of Louis D. Brandeis, on behalf of the Massachusetts Protective Liquor Dealers' Ass'n, before the Joint Comm. on Liquor Law of the Massachusetts Legislature, Feb. 27, 1891, reprinted in 1 Hearings on the Nomination of Louis D. Brandeis Before a Subcomm. of the Senate Comm. on the Judiciary 1057, 1065 (1916).

As far back as 1912, this Court held that an ordinance that allowed the owners of two thirds of the property abutting a street to establish a "building line" beyond which construction was not permitted was a violation of due process. *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912). The Court explained its ruling,

The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously.... *Id.* At 143

The leading treatises from early American law further support that the Due Process Clause prohibits the type of delegation present in this case. "The principle is a plain one that the public powers or trusts devolved by law or charter upon a council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." 1 John Forrest Dillon, *The Law of Municipal Corporations* § 60 (2d ed. 1873). "The principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers or agents cannot be surrendered or delegated to others." 1 Eugene McQuillin, *A Treatise on the Law of Municipal Corporations* § 382 (1911). "So far as its functions are legislative, they rest in the discretion and judgment of the municipal body entrusted with them, and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority." Thomas McIntyre Cooley & Victor Hugo Lane, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 293 (7th ed. 1903).

*Amici* fully support and endorse U-J Eighty's legal arguments that Bloomington's delegation of zoning authority violated the Due Process Clause. Bloomington gave IU the absolute right to object and control the zoning for neighboring and competing properties. Accordingly, the Court should accept this case and reverse the decision of the Indiana Supreme Court.

## II. THE DECISION WILL INTERFERE WITH STUDENTS' ABILITY TO ASSOCIATE

There can be no dispute that students retain their constitutional rights. "It can hardly be argued that either students or teachers shed their constitutional rights... at

the school house gate." *Tinker v. Des Moines Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This Court has long recognized the need of "vigilant protection" of such rights. The Court has repeatedly affirmed that the college campus has a unique role as "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted). "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." *Sweezy v. New Hampshire*, 355 U.S. 852 (1957). "The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479 (1960).

One such right that must be protected is the right of students to freely associate. The Court has recognized that there are two kinds of freedom of association: intimate and expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of

association of this kind as an indispensable means of preserving other individual liberties. *Id.* at 617-18.

While a college may regulate student groups that receive official recognition, “[p]rivate groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation.” *Christian Legal Soc’y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 690-91 (2010).

What Bloomington and IU are doing here, and other municipalities and colleges are doing throughout the United States, is using zoning to interfere with the rights of students to freely associate. This is an impermissible use of zoning authority. The Maine Supreme Judicial Court warned of such abuses:

[W]e are mindful that zoning has been used frequently for ends which while ostensibly within the traditional objectives of zoning—protection of health, safety, morals and general welfare—are in *fact* unrelated to those purposes.... Recognizing this potential for abuse inhering in the zoning power, both federal and state courts have in recent years ordered modifications in zoning plans on equal protection and due process grounds. *Barnard v. Zoning Board of Appeals of Yarmouth*, 313 A.2d 741, 745 (Me. 1974).

Zoning regulations cannot be used as a subterfuge to violate the rights of students to freely associate. Linking zoning approval to a university’s unlimited, unreviewable discretion to determine which groups to bestow official recognition violates the Due Process Clause.

### III. DELEGATION OF ZONING AUTHORITY ENDANGERS FRATERNAL CHAPTERS NATIONWIDE

The member organizations that comprise FFC collectively have approximately 775 fraternity chapters. The members of FHA collectively own chapter houses worth over \$3 billion and that house over 250,000 students. All privately owned fraternity houses are at risk if a college is permitted to arbitrarily eliminate chapter houses through zoning regulations. Not only would this devastate the members of FFC, FHA, and other fraternal organizations, this would also drive up the costs of student housing by eliminating competition<sup>3</sup> at a time when room and board outweigh tuition costs at most public universities.

While ownership of chapter houses varies (some chapter houses are owned by house corporations; others are rented from third-party landlords; and some are university owned), most houses are owned by local house corporations, not the national fraternal organizations. The physical chapter house is typically the only asset of a house corporation.

One universal truth is that housing is a vital part of the fraternal experience. Fraternity houses provide a clean and safe environment for living, learning, and growing, often at a lower cost to students than university-owned housing. The goal is provide a home away from home for students to more closely connect with other fraternity members.

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<sup>3</sup> While fraternity chapters and universities compete in the student housing market, it is far from a level field. Universities have far greater resources and far better access to students. Importantly, the current tax code does not allow fraternities and other not-for-profit student organizations to use tax-deductible donations for housing improvements in the same way the universities can.

Fraternity houses provide an opportunity for students to live and learn together and are often the first residential experience where students are responsible for signing a lease, paying rent, cleaning up after themselves, and maintaining the property.

Chapter houses are also unique from other student housing options. Fraternity houses are located on or near college campuses and are designed for communal living. They are uniquely designed to serve an undergraduate fraternity chapter and cannot easily be transformed into another use. Because of the unique location and configuration, a fraternity chapter house is unusable for any other private purpose. A house with a community kitchen, community bathrooms, and 20+ bedrooms cannot simply be transformed into a single-family residence or even an apartment building. *See Milam v. Commonwealth*, 483 S.W.3d 347, 350 (holding that a fraternity house is considered a private residence for Fourth Amendment purposes and is not akin to an apartment building or hotel). Losing the ability to use chapter houses as fraternity housing would destroy all value of these properties and would ruin thousands of house corporations.

Further, stability is crucial. A chapter must be able to show students that its ability to exist will not be eliminated at the whims of a university. Stability is necessary for recruitment of new members to maintain the chapter and fill the house with students. The threat of a forced eviction during the middle of a semester due to a loss of zoning compliance will interfere with recruitment and retention of new members.

Leases for student housing in chapter houses are cyclical on either a school year or semester basis. If a chapter loses recognition mid-semester, the house corporation or property owner cannot simply pivot to another use under the zoning code and continue on in an economically-viable manner.

Stability is also necessary for financial purposes. For example, loans for new construction, renovations, additions, and remodeling projects would be considered too great of a risk if the zoning was subject to a college's arbitrary decision of whether to bestow official recognition to a fraternity chapter. Zoning restrictions like the one in this case will render financing for acquisition and improvements impossible.

The members of FFC strive to develop strong relationships and work cooperatively with university administrators. However, some chapters of FFC members, while affiliated with a national fraternal organization, operate without university recognition. This is consistent with the Court's statement in *Christian Legal Soc'y* that fraternities "commonly maintain a presence at universities without official school affiliation." *Christian Legal Soc'y*, 561 U.S. at 690-91.

Together, the members of FFC have approximately fifty chapters that exist without university recognition. The continued existence of those fifty chapters would be put at immediate risk if the decision below is allowed to stand. Further, municipalities and universities would be emboldened to follow the lead of Bloomington and IU and to restrict the ability of chapters to exist without university recognition.

Ultimately, all fraternity and sorority chapter houses are at risk if the decision from the Indiana Supreme Court is upheld. Colleges must be prevented from using zoning regulations to eliminate fraternal organizations that have existed and thrived for centuries.



**CONCLUSION**

The petition for a writ of certiorari should be granted and the decision from the Indiana Supreme Court reversed.

Respectfully submitted,

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